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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 ANDRE KING-HARDIMAN,

Case No. 3:19-cv-00484-MMD-WGC

7 Petitioner,

ORDER

8 v.

9 GITTERE, *et al.*,

10 Respondents.
11

12 This is a closed habeas corpus action under 28 U.S.C. § 2254. Petitioner had
13 commenced the action without either filing an application to proceed *in forma pauperis* or
14 paying the filing fee. (See ECF No. 3.) The Court directed Petitioner to file a complete
15 application to proceed *in forma pauperis* or to pay the filing fee. (*Id.*) Petitioner filed an
16 incomplete application to proceed *in forma pauperis*. (ECF No. 4.) The Court again
17 directed Petitioner to file a complete application to proceed *in forma pauperis* or to pay the
18 filing fee. (ECF No. 6.) Two months later, the Court dismissed the action for non-
19 compliance. (ECF No. 7.) Petitioner then paid the filing fee almost a month after the
20 dismissal. (ECF No. 9.) Petitioner also filed a new petition for a writ of habeas corpus.
21 (ECF No. 10.)

22 By the Court's calculations, the initial petition effectively was timely filed based upon
23 the postmark of August 8, 2019. (See ECF No. 1-1 at 9.) However, the one-year period of
24 limitation under 28 U.S.C. § 2244(d)(1) expired soon after commencement of the action.
25 See 28 U.S.C. § 2244(d)(1). If Petitioner commenced a new habeas corpus action, then it
26 would be untimely, because the time spent on this action did not toll the one-year period
27 under 28 U.S.C. § 2244(d)(2). See *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).
28 Instead, the Court will reinstate the action.

1 The sole claim in the new petition (ECF No. 10) is the same as the sole claim in the
2 initial petition (ECF No. 1-1)—that counsel failed to correct or object to the state district
3 judge's incorrect statement about the possible penalties for first-degree murder.¹ The
4 claim thus relates back to the initial petition. See *Mayle v. Felix*, 545 U.S. 644, 664 (2005).

5 Petitioner submitted a motion for appointment of counsel along with the initial
6 petition.² Petitioner is unable to afford counsel. See 18 U.S.C. § 3006A. Petitioner is also
7 serving a sentence of life without the possibility of parole.³ His claim raises the possibility
8 that the state district judge's misstatement of potential sentences might have affected his
9 decision to plead guilty. For these reasons, the Court will appoint counsel.

10 It is therefore ordered that the Clerk of the Court will reopen this action.

11 It is further ordered that the Clerk of the Court will file the motion for appointment of
12 counsel, currently in the docket at ECF No. 1-2.

13 It is further ordered that the motion for appointment of counsel is granted.

14 It is further ordered that the Federal Public Defender is appointed provisionally as
15 counsel. The Federal Public Defender will have 30 days from the date of entry of this order
16 either to undertake representation of Petitioner or to indicate to the Court the office's
17 inability to represent Petitioner. If the Federal Public Defender is unable to represent
18 Petitioner, then the Court will appoint alternate counsel. The Court will set a deadline for
19 filing of an amended petition or a motion seeking other relief after counsel has appeared.
20 The Court anticipates setting the deadline for 60 days from entry of the formal order of

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22 ¹The Court did not formally file the initial petition because it dismissed the action.
23 The Court will not file the initial petition now because, with the filing of the new petition
(ECF No. 10), it would run a risk of confusion as to which is actually the later-filed petition.

24 ²Petitioner also submitted a notice of appeal, purporting to appeal a decision of the
25 Nevada Court of Appeals. The Court will take no action on this notice of appeal because
26 the Court does not have appellate jurisdiction over the Nevada state courts. *D.C. Ct. App.*
v. Feldman, 460 U.S. 462, 476, 483 n.16 (1983); *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413,
415–16 (1923).

27 ³Petitioner alleges that he was convicted of first-degree murder, robbery, burglary,
28 and home invasion. He alleges only one sentence of life without the possibility of parole.
It is unclear whether the state district court imposed the sentences for the other offenses
concurrently or consecutively.

1 appointment. The Court does not signify any implied finding of tolling during any time
2 period established or any extension granted. Petitioner always remains responsible for
3 calculating the limitation period of 28 U.S.C. § 2244(d)(1) and timely presenting claims.
4 The Court makes no representation that the petition, any amendments to the petition, and
5 any claims in the petition or amendments are not subject to dismissal as untimely. See
6 *Sossa v. Diaz*, 729 F.3d 1225, 1235 (9th Cir. 2013).

7 It is further ordered that the Clerk add Aaron Ford, Attorney General for the State
8 of Nevada, as counsel for Respondents.

9 It is further ordered that the Clerk electronically serve both the Attorney General of
10 the State of Nevada and the Federal Public Defender a copy of the petition and a copy of
11 this order.

12 It is further ordered that Respondents' counsel must enter a notice of appearance
13 within 21 days of entry of this order, but no further response will be required from
14 Respondents until further order of the Court.

15 It is further ordered that the Clerk will provide copies of all prior filings to both the
16 Attorney General and the Federal Public Defender in a manner consistent with the Clerk's
17 current practice, such as regeneration of notices of electronic filing.

18 DATED THIS 14th day of February 2020.

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MIRANDA M. DU
22 CHIEF UNITED STATES DISTRICT JUDGE
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